



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

Mr. Glenn Rider
Pennsylvania Department of Environmental Protection
Rachel Carson State Office Building
400 Market Street
Harrisburg, Pennsylvania 17105-8775

NOV 18 2010

Dear Mr. Rider:

This correspondence conveys the U.S. Environmental Protection Agency's (EPA or the Agency) final comments regarding the latest version of Pennsylvania's Phase II Municipal Separate Storm Sewer System (MS4) general permit (PAG-13), which was submitted to the Agency via email from Barry Newman, Pennsylvania Department of Environmental Protection (PADEP), on August 20, 2010. Another version which was revised to potentially release permittees from any responsibility for Minimum Control Measure (MCM) Number 5, Post-Construction Stormwater Management in New and Redevelopment was submitted on November 18, 2010. EPA considers this a substantial revision. As such, EPA is allowed ninety (90) days from today, or until February 16, 2011, to review this draft permit under the terms of the Memorandum of Agreement (MOA) between PADEP and EPA for authorization of the National Pollutant Discharge System Elimination (NPDES) Program. We have every expectation that we will be able to resolve our concerns in the near future and do not support a one-year extension of this permit. As a matter of clarification, this letter also represents EPA's interpretation of the requirements and expectations for the PAG-13 and its permittees based on previous discussion and correspondence between our respective agencies and federal regulatory requirements.

MS4 Regulated Boundary

PADEP and EPA agree that the regulated system includes the entire storm sewer system located within the designated/urbanized boundary and that discharges from those systems are considered point sources. All drainage from the urbanized area into the MS4 system is covered by the MS4 permit and, therefore, the ultimate responsibility for regulating and controlling discharges into the system rests with the permittee. Municipalities in Pennsylvania, like those in other states, have broad authority to regulate and control the activities of individuals and landowners within their jurisdiction. This is evidenced by zoning and land development requirements, trash collection restrictions, transfer of property inspections, enforcement of plumbing and building codes, etc.



Incorporation of the Chesapeake Bay TMDL

This permit shall address impairments to the Chesapeake Bay in all respects. Permittees that are required to submit a TMDL Implementation Plan for PADEP review and approval shall do so during the term of the proposed permit. Part C of the Authorization to Discharge requires that MS4 dischargers to the Chesapeake Bay to prepare a TMDL Implementation Plan to demonstrate conformance with the conditions of the TMDL. Language recommended by PADEP pertaining to conformance with the Pennsylvania Watershed Implementation Plan is not adequate to comport with federal regulations at 40 C.F.R. §122.44(d)(1)(vii)(B) and should not be included in the permit.

Liability for Construction and Post-Construction Requirements

40 CFR 122.35(a) gives MS4 permittees the option of sharing responsibility to implement minimum control measures with another entity -- thereby allowing PAG-13 permittees to rely on state programs (such as Pennsylvania's State Construction Program) for MCM #4 and portions of MCM #5 related to control of construction and post-construction runoff. PADEP has the regulatory authority under state law to inspect and enforce post construction requirements for activities that disturb one acre or more of land.

According to 40 CFR 122.35(a)(3), the permittee "remains responsible for compliance with their permit obligations if the other entity fails to implement the control measure (or component thereof)." This regulatory language is mirrored in PAG-13 (see Authorization to Discharge, Part A.2.h) and confirms that responsibility for compliance with minimum control measures remains with the MS4 permittee. Thus, EPA expects to hold permittees liable for compliance with construction and post-construction requirements in the event that a third party does not fulfill the obligations stated in the permit.

TMDL Implementation Plan Content, Review and Approval

The TMDL Implementation Plan, as a permit requirement (see Authorization to Discharge, Part C), becomes an enforceable element of the MS4 permit once approved by PADEP. Since this issuance will be the initial permit term for utilization of the TMDL Plan by the Department, EPA would like the opportunity to perform a selected review of the submitted plans prior to PADEP approval. Therefore, EPA respectfully requests that the first 20 plans received by PADEP be submitted to the Agency prior to PADEP approval so that a quality and enforceability review of the plans can be conducted. EPA will relay the results of its findings to PADEP so that they might be addressed by the permittees.

Annual Reporting

PADEP has indicated to EPA that its Annual Reporting format is consistent with federal regulations at 40 CFR 122.34(g)(3). A recent file review performed in one of the Department's six regions as part of an EPA enforcement assignment revealed that the annual reporting form currently in use was not an effective tool for the assessment of the MS4 programs and that the

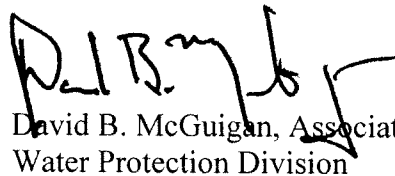


Department's review of those reports was lacking in consistency. EPA created a new reporting format to ease the reporting burden on the MS4 permittees and make it easier for PADEP review and enforcement. EPA is pleased that PADEP is committed to revising the current format and will work with PADEP to ensure that a quality and effective reporting form is realized prior to the effective date of the new permit.

In closing, as part of the Chesapeake Bay Enforcement Strategy EPA has focused and will continue to focus on MS4 compliance in the Chesapeake Bay Watershed. The information gathered during our compliance assurance efforts will be guiding the development of a Stormwater Program Assessment. The intent of this Assessment will be to evaluate whether state programs: (1) conform to regulatory requirements; (2) are being effectively implemented from both a compliance and programmatic perspective; and (3) are achieving their water quality objectives. EPA expects that PADEP will be open to the possibility of amending the permit prior to the end of the five year permit term if the results of the assessment indicate that the current proposed permit is failing to meet programmatic and environmental objectives.

Please do not hesitate to direct any questions or comments to me or to Evelyn MacKnight, at 215-814-5717.

Sincerely,



David B. McGuigan, Associate Director
Water Protection Division

cc: Ken Murin, PADEP
Barry Newman, PADEP

